Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PAULINE COMPANY, INC. and
RABBIT CORPORATION,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Civil Rights Act of 1991 amend 42 U.S.C. § 1981 to allow a direct cause of action against a governmental entity thereby overruling *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989)?

PARTIES TO THE PROCEEDING BELOW

The Petitioners in this Court, Pauline Company, Inc. and Rabbit Corporation[1], were Plaintiffs in two separate, but virtually identical cases before the Iowa District Court in and for Black Hawk County and were Appellees in the appeal to the Iowa State Supreme Court. The cases were combined while on appeal before the Iowa Supreme Court. The Respondent, Iowa Department of Transportation, was the Defendant in the Iowa District Court in and for Black Hawk County and the Appellant in the appeal to the Iowa State Supreme Court.

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[1] Pursuant to Supreme Court Rule 29.6, it is hereby noted that neither Pauline Company, Inc, nor Rabbit Corporation have a parent company or publicly held corporation owning 10% or more of the corporation's stock.

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OPINIONS BELOW

The Iowa Supreme Court opinion that petitioners ask this Court to review is *Pauline Company, Inc. v. Iowa Department of Transportation; Rabbit Corporation v. Iowa Department of Transportation*, 637 N.W.2d 191 (Iowa 2001). The District Court opinion is unpublished. Both opinions are reproduced in the Appendix.

JURISDICTIONAL BASIS

This petition asks the Court to review the December 19, 2001, opinion and judgment of the Iowa State Supreme Court. The Iowa State Supreme Court reversed the decision of the Iowa District Court. The Iowa Supreme Court held that the amendments to 42 U.S.C. § 1981 resulting from the Civil Rights Act of 1991, did not overrule *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989). Should the Court grant the petition, it would have jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to

sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

This petition asks the Court to review the Iowa Supreme Court's decision reversing the Iowa District Court, thereby granting the Iowa Department of Transportation's Motions to Dismiss. The petitioners claimed that as minority contractors they were discriminated against by the Iowa Department of Transportation. App. 6-16. The Iowa Department of Transportation moved to dismiss the claims asserting that 42 U.S.C. § 1981 does not allow for a direct action for discrimination against a

governmental entity. The Iowa Department of Transportation relied upon *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) to support its argument that Pauline Company and Rabbit Corporation had no right under 42 U.S.C. § 1981 to bring a claim against a state or a state agency. Pauline Company and Rabbit Corporation resisted the Motions to Dismiss by arguing that *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989), had been legislatively overruled by the 1991 Civil Rights Act which amended 42 U.S.C. § 1981.

A hearing was held before the Iowa District Court which ruled in favor of Pauline Company and Rabbit Corporation. App. 17-19. The Iowa District Judge, Judge Zager, accurately stated the issue as follows:

> The sole issue to be determined by this court is whether the Civil Rights Act of 1991 amended 42 U.S.C. Section 1981, to allow a direct cause of action against a municipality overruling *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989).

App. 18. The Iowa District Court noted that this was a case of first impression in the State of Iowa and that the federal circuits are split on the issue. App. 18. Ultimately, the Iowa District Court ruled as follows:

> Relying upon the analysis contained in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996), this court finds that amended 42 U.S.C. Section 1981 contains an implied cause of action against state actors, thereby overturning *Jett's* holding that 42

> U.S.C. Section 1983 provides the exclusive remedy against state actors for the violation of rights under 42 U.S.C. Section 1981.

App. 18-19.

The Iowa State Supreme Court, however, reversed the Iowa District Court. The Iowa State Supreme Court noted the split among the federal circuits, but unlike the Iowa District Court which had followed the 9th Circuit's decision of *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996), the Iowa State Supreme Court followed the contrary decisions of the 11th and 4th circuits of *Butts v. County of Volusia*, 222 F.3d 891 (11th Cir. 2000) and *Dennis v. County of Fairfax*, 55 F.3d 151 (4th Cir. 1995). App. 3-5. The Iowa Supreme Court held that the Civil Rights Act of 1991 which amended 42 U.S.C. § 1981 did not overrule *Jett* and did not alter 42 U.S.C. § 1981 in a manner that permits an action for discrimination against a state-entity defendant.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE IOWA SUPREME COURT ON AN IMPORTANT FEDERAL QUESTION CONFLICTS DIRECTLY WITH A DECISION OF A UNITED STATES COURT OF APPEALS.

The Iowa Supreme Court's decision in this case is in direct conflict with *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996). The Iowa Supreme Court, faced with a split among the federal circuit courts, chose to follow the competing line of cases. This Court should resolve the split among the Circuits

and rule that the Civil Rights Act of 1991 which, in part, amended 42 U.S.C. § 1981, overruled *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989), and thereby allows a cause of action pursuant to 42 U.S.C. § 1981 directly against state entities.

A. 42 U.S.C. § 1981 CONTAINS AN IMPLIED CAUSE OF ACTION AGAINST STATE ACTORS.

The split among the federal circuit courts centers on the differing opinions of whether the amendment to 42 U.S.C. § 1981 resulting from the Civil Rights Act of 1991 provides for a cause of action against state actors. In *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), the United States Supreme Court set out the four-factor test to be used in determining whether a statute implies a private cause of action for damages. Those factors are as follows:

1. Is the plaintiff one of the class for whose "*especial* benefit" the statute was enacted; that is, does the statute create a federal right in favor of the plaintiff?

2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

4. Is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort, 422 U.S. at 78, 95 S. Ct. at 2088 (internal citations omitted) (emphasis in the original). *See, Federation of African American Contractors v. City of Oakland*, 96 F.3d at 1210.

In *Federation of African American Contractors v. City of Oakland*, the Court examined each of these factors as it applies to a claim by a contractor against a municipality under 42 U.S.C. 1981(c), precisely the claim made by Pauline Company and Rabbit Corporation in the present case. In considering the claim, the Court addressed the question of whether the 1991 Amendment to 42 U.S.C. 1981 overruled *Jett*. *Federation of African American Contractors v. City of Oakland*, 96 F.3d at 1208. The Court noted the split among the federal courts on the issue, as well as the split among the commentators. *Federation of African American Contractors v. City of Oakland*, 96 F.3d at 1209. With those differing views in mind, the Court undertook its own analysis of the question by applying the *Cort* four-factor test. *Federation of African American Contractors v. City of Oakland*, 96 F.3d at 1210-14. In doing so, however, it was noted that the principal focus of the analysis is whether Congress intended to create a private right of action. *Id.* at 1210. The central inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action. *Id.* at 1210, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575; 99 S. Ct. 2479, 2489; 61 L. Ed. 2d 82 (1979), *accord, Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16; 100 S. Ct. 242, 245-46; 62 L. Ed. 2d 146 (1979); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91; 101 S. Ct. 1571, 1580; 67 L. Ed. 2d 750 (1981), *Suter v. Artist M.*, 503 U.S. 347, 363-64; 112 S. Ct. 1360, 1370-71; 118 L. Ed. 2d 1 (1992).

Relative to this inquiry is the language of the statute, its legislative history, and the legislative scheme of which the statute is a part. *Federation of African American Contractors v. City of Oakland*, 96 F.3d at 1211, *citing*, *Touche Ross*, 442 U.S. at 568, 571-72; 99 S. Ct. at 2485, 2486-87, *Northwest Airlines*, 451 U.S. at 91, 101 S. Ct. at 1580. In *Touche Ross*, the Supreme Court equated these three factors with the first three factors of the *Cort* test. *Touche Ross*, 442 U.S. at 568, 575-76; 99 S. Ct. at 2485, 2488-89.

1. Factor No. 1: Is the plaintiff one of the class for whose "*especial* benefit" the statute was enacted; that is, does the statute create a federal right in favor of the Plaintiff?

In addressing the first factor, the *Federation of African American Contractors v. City of Oakland* Court had no problem finding that the minority contractor there was the beneficiary of the special benefit of 42 U.S.C. 1981(c). *Federation of African American Contractors v. City of Oakland*, 96 F.3d at 1211. It was noted that the new 1981(c) makes explicit that the rights protected by 1981(a) are protected against impairment by nongovernmental discrimination and impairment under color of state law. As the Ninth Circuit stated:

> Applying the first *Cort* factor, we conclude that the statute, by its plain terms, creates federal civil rights in favor of a class of persons that included [the minority contractor in question].

Federation of African American Contractors v. City of Oakland, 96 F.3d at 1211. The Plaintiffs in the present case are

in exactly the same position as the Plaintiff in *Federation of African American Contractors v. City of Oakland.*

2. Factor 2: Is there legislative intent, explicit or implicit, to create or deny such a remedy?

Legislative history supports an implicit right of action against state actors. The legislative history surrounding the 1991 Amendment to 42 U.S.C. § 1981 does not explicitly announce an intent to create or deny a private right of action against a state actor. *Federation of African American Contractors v. City of Oakland,* 96 F.3d at 1212. Instead, it suggests that Congress's intent in adding this subsection was to codify *Runyon v. McCrary,* 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), which held that 1981 rights are protected against private discrimination, as well as discrimination against state actors. *Federation of African American Contractors v. City of Oakland,* 96 F.3d at 1211. The House Committee on the Judiciary explained in its report on the legislation that the Amendment to 1981 was intended to codify *Runyon v. McCrary,* noting further that "[t]he Committee intends to prohibit racial discrimination in all contracts, both public and private." H.Rep. No. 102-40(II), 102d Cong. 1st Sess. 37, reprinted in 1991 U.S.C.C.A.N. 694, 731.

Although the Committee reports do not address the Amendment's potential affects on *Jett,* they clearly contemplate that the 1981 rights are to receive parallel protections against state actors and private actors. *Federation of African American Contractors v. City of Oakland,* 96 F.3d at 1213. Implying a direct cause of action against state actors under 42 U.S.C. § 1981 is consistent with this

intent. *Id.* By including language that explicitly protects 1981 rights from impairment by *both* private and governmental entities, the Amendment makes clear that Congress intended a comparable scope of protection against each type of defendant. *Id.* To achieve parallel protection against private and governmental entities, comparable remedies against each type of defendant is necessary. *Id.*

In *Federation of African American Contractors v. City of Oakland*, it was noted that Congress did not add language explicitly recognizing a private cause of action against private actors, yet this principle, too, was contained in the Supreme Court's decision in *Runyon*. *Id.* The addition of 1981(c) to codify *Runyon* thus signals that Congress intended to codify an implied cause of action against private defendants. *Id.* Because 1981(c) affords identical protection against impairment by nongovernmental discrimination and impairment under color of state law, and because 1981(c) also contains an implied cause of action against private actors, it has been held that an implied cause of action exists against state actors who impair a claimant's 1981 rights. *Id.*

Johnson v. City of Fort Lauderdale, 903 F. Supp. 1520 (S.D. Fla. 1995), stated that the legislative history does not create a cause of action against a state actor. The Court, in *Federation of African American Contractors v. City of Oakland*, specifically addressed *Johnson*, in the following manner:

> At least one court has concluded that Congress's intent in adding 1981(c) to codify *Runyon* precludes a congressional intent to overrule *Jett*. *Johnson*, 903 F. Supp. at 1523. We disagree. The

holding in *Runyon* was premised on the availability of an implied cause of action against private defendants under 42 U.S.C. 1981. *See Runyon* 427 U.S. at 169-174, 96 S. Ct. at 2594-96. In our view, Congress, in adding 1981(c) to codify *Runyon*, necessarily codified the implied cause of action on which *Runyon* was based. We infer from 1981(c)'s identical treatment of private entities and governmental entities that 1981(c) permits both an implied cause of action against private defendants and an implied cause of action against government defendants.

The lack of legislative history announcing an express intent to overrule *Jett* by adding 1981(c) does not preclude an implied cause of action against state actors under 42 U.S.C. 1981. In applying the implied remedy doctrine, the Supreme Court has explained that "while the absence of anything in the legislative history that indicates an intention to confer any private right of action is hardly helpful [to a claimant], it does not automatically undermine [the claimant's] position . . . [t]he failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors*, 444 U.S. at 18, 100 S. Ct. at 246. (Citation omitted) (further citations omitted).

Federation of African American Contractors v. City of Oakland, 96 F.3d at 1213.

3. Factor 3: Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?

The purposes of the Civil Rights Act of 1991 are enumerated in Section 3 of the Act, which identifies "provid[ing] appropriate remedies for intentional discrimination and unlawful harassment in the workplace" as a key objective. *Id.* at 1214. The implication of a direct cause of action against municipalities under 42 U.S.C. 1981 advances Congress's general purpose of remedying civil rights violations and its particular purpose in enacting 1981(c): ensuring that the well-established rights contained in the statute are guaranteed against both private parties and state actors. *Id.*

In applying the third prong of the *Cort* test, federal courts often view the availability of other enforcement mechanisms in a statutory scheme as preclusive of an implied cause of action. *See, Touche Ross,* 442 U.W. at 571-72, 99 S. Ct. at 2486-87. There is no alternative enforcement mechanism in the revised 42 U.S.C. 1981. Therefore, an implied cause of action compliments, rather than clashes with, the legislative scheme of 42 U.S.C. 1981. *Id.* Thus, the third factor of the *Cort* test is fulfilled and supports the recognition of an implied cause of action against state actors in 42 U.S.C. 1981(c).

4. The fourth factor: Is this cause of action one traditionally relegated to state law?

Private causes of action against state actors who impair federal civil rights have not been traditionally relegated to state law. *Id.* at 1214. Since the Civil War, the

Federal Government and the federal courts have been the primary and powerful reliances in protecting citizens against such discrimination. *Cannon v. University of Chicago*, 441 U.S. 677, 708; 99 S. Ct. 1946, 1964 (1979). 42 U.S.C. 1981 and 1983, originally enacted as portions of the Civil Rights Acts of 1866 and 1871, were enacted precisely because citizens' federal rights had come under attack from the states. *See, Jett*, 491 U.S. at 711-725, 109 S. Ct. at 2710-18 (discussing history of the Civil Rights Acts of 1866 and 1871 and the impetus for 1983's federal damages action against state violations of federal civil rights). Clearly, the recognition of an implied cause of action in 42 U.S.C. 1981 against state actors does not invade the province of the states, since the states have not historically regulated such causes of action. Thus, the fourth factor of the *Cort* test is fulfilled.

B. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AND FIND THAT *JETT v. DALLAS INDEPENDENT SCHOOL DISTRICT*, HAS BEEN LEGISLATIVELY OVERRULED.

The legislative history of the 1991 Amendment to 42 U.S.C. 1981, states, in part, "[t]he Committee intends to prohibit racial discrimination in all contracts, both public and private." H.Rep. No. 102-40(II), 102d Cong. 1st Sess. 37, reprinted in 1991 U.S.C.C.A.N. 694, 731. The Committee reports clearly contemplate that 1981 rights are to receive parallel protections against state actors and private actors. *Federation of African American Contractors v. City of Oakland*, 96 F.3d at 1213. Implying a direct cause of action against state actors pursuant to 42 U.S.C. § 1981 is

consistent with this intent. *Id.* By including language that explicitly protects 1981 rights from impairment by *both* private and governmental entities, the Amendment makes clear that Congress intended a comparable scope of protection against each type of defendant. *Id.* To achieve parallel protection against private and governmental entities, comparable remedies against each type of defendant is necessary. *Id.*

CONCLUSION

This Court should grant the writ and reverse the decision of the Iowa State Supreme Court. Petitioner's are entitled to a trial to prove their claims.

Respectfully submitted,

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Supreme Court of Iowa.

PAULINE COMPANY, INC., Appellee,

v.

IOWA DEPARTMENT OF TRANSPORTATION, Appellant.

Rabbit Corporation, Appellee,

v.

Iowa Department of Transportation, Appellant.

No. 00-0188.

Dec. 19, 2001.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

Peter J. Gartelos and Timothy D. Ament of Gartelos, Wagner & Ament, Waterloo, for appellees.

CARTER, Justice.

The Iowa Department of Transportation (IDOT) appeals by permission from the denial of its motion to dismiss two civil rights actions brought under 42 U.S.C. § 1981 by minority-owned construction **companies Pauline Company** and Rabbit Corporation. The plaintiffs allege that they were subjected to racial discrimination in the course of performing subcontracts on IDOT projects. IDOT's motions to dismiss asserted that 42 U.S.C. § 1981 may not be made the basis for a damage claim against a state entity. It contends that the remedy for state action that does not comply with 42 U.S.C. § 1981 lies exclusively under 42 U.S.C. § 1983. The district court rejected that argument. After reviewing the record and considering the arguments presented, we agree with IDOT's contention and reverse the judgment of the district court.

In *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), the Supreme Court was asked to determine if 42 U.S.C. § 1981 provided an independent federal cause of action for damages against government entities. The Court concluded Congress intended the explicit remedial provisions of 42 U.S.C. § 1983 to be the exclusive vehicle for damage actions brought against state actors for violations of rights declared in § 1981. *Id.* at 731, 109 S.Ct. at 2721, 105 L.Ed.2d at 624.[1] In seeking to uphold the district court's ruling in the present case, plaintiffs urge that, following the *Jett* decision, a 1991 amendment to 42 U.S.C. § 1981 altered the statute in a manner that now recognizes a cause of action against state actors under that statute.

At the time *Jett* was decided, 42 U.S.C. § 1981 provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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[1] A very significant consequence of this conclusion is the related holding of the Court that a state entity is not subject to suit for civil rights violations based on 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45, 58 (1989).

Subsequently, Congress passed the Civil Rights Act of 1991, which added two subsections to 42 U.S.C. § 1981:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Pub.L. No. 102-166, 105 Stat. 1071, Title 1, § 101 (1991). Only subsection (c) is at issue here.

One federal circuit has agreed with plaintiffs' argument and held that it was the purpose of § 1981(c), as added to the statute in 1991, to treat private actors and state actors similarly with respect to their right to sue. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir.1996). Because private actors were subject to suit under § 1981, the court held that state actors could be similarly sued. Two federal circuits have ruled otherwise, holding that the 1991 amendment to § 1981 did not alter the statute in a manner that affected *Jett's* limitation on liability suits challenging state action. *Butts v. County of Volusia*, 222 F.3d 891, 892 (11th Cir.2000); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir.1995).

We are convinced that the holdings of the eleventh circuit and the fourth circuit have correctly determined that the 1991 amendment to 42 U.S.C. § 1981 did not alter its legal effect with respect to remedies against state actors. The primary basis for our conclusion is to be

found in the Supreme Court's discussion in *Jett*. The Court expressly concluded that "Congress has established its own remedial scheme" for § 1981 violations. *Jett*, 491 U.S. at 731-32, 109 S.Ct. at 2721, 105 L.Ed.2d at 624. The Court found this remedial scheme to be that contained in § 1983. *Id.* A separate opinion by a justice who joined in the division of the opinion that relegated state-action violations to suits under § 1983 stated the point more precisely:

> To hold that the more general provisions of 42 U.S.C. § 1981 establish a mode of liability for a particular category of offense by municipalities that is excluded from the closely related statute (42 U.S.C. § 1983) which deals more specifically with that precise category of offense would violate the rudimentary principles of construction that the specific governs the general, and that, where text permits, statutes dealing with similar subjects should be interpreted harmoniously.

Jett, 491 U.S. at 738-39, 109 S.Ct. at 2724, 105 L.Ed.2d at 629 (Scalia, J., concurring). Nothing in the 1991 amendment speaks of adding a remedy under that statute for claims against state actors. If a departure from existing law of that magnitude had been intended, we believe the Congress would have expressly so stated in the language of the amendment.

The House Committee on the Judiciary explained in its report that the Civil Rights Act of 1991 was enacted in response to a number of Supreme Court decisions limiting the scope and effectiveness of discrimination in employment laws. H.R.Rep. No. 102-40(II), at 1 (1991). The report listed ten Supreme Court decisions, which

were overruled by the Civil Rights Act of 1991. *Id.* at 2-4. *Jett* was not among the decisions listed. *Id.* We are satisfied that the 1991 amendment did not alter the legislation in a manner that permits the present action to proceed against this state-entity defendant. The judgment of the district court must be reversed. The case is remanded to that court for an order granting IDOT's motions to dismiss in each action.

REVERSED AND REMANDED.

IN THE IOWA DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY

PAULINE COMPANY, INC., Plaintiff, vs. IOWA DEPARTMENT OF TRANSPORTATION, Defendant.	Law No. LACV083098 **SECOND AMENDED PETITION AND JURY DEMAND** (Filed Dec. 10, 1999)

COMES NOW the Plaintiff, and in support of its claim against the Defendant, Iowa Department of transportation, states:

COUNT I

1. The Plaintiff, Pauline Company, Inc., is an Iowa minority owned corporation and a Certified Disadvantaged Business Enterprise (DBE) in good standing.

2. The Defendant, Iowa Department of Transportation, is a department of the government of the State of Iowa.

3. Pauline Company, Inc. is in the business of contracting which, in part, consists of contracting to provide services for road construction with the Iowa Department of Transportation.

4. Pauline Company, Inc. has been intentionally discriminated against by the Iowa Department of Transportation because of its status as a minority owned contractor.

5. Specific instances of intentional discrimination against Pauline Company, Inc. by the Iowa Department of Transportation include:

a. Pauline Company was involved in several projects in 1998 which required fence building contracted by the Iowa Department of Transportation. However, Pauline Company, Inc. was required by the Iowa Department of Transportation to build fences differently than other non-minority contractors resulting in additional cost and expense to Pauline Company, Inc. Pauline Company, Inc. was further required by the Iowa Department of Transportation to build a double pull post assembly whereas non-minority contractors were allowed to build a single pull post assembly.

b. In the course of fence building projects Pauline Company, Inc. required to use mechanical connectors to splice brace wires whereas non-minority owned contractors were allowed to splice brace wires by wrapping it around itself.

c. In May of 1999, Pauline Company, Inc. was required to stop work on a fencing project NHS-218-9(81)-19-34 as a result of the Iowa Department of Transportation asserting that the wood posts being used were not approved by the Iowa Department of Transportation. These wood posts had previously been approved by the Iowa Department of Transportation and had been used by non-minority contractors.

d. In July 1999, Pauline Company, Inc. installed handicapped ramps in the course of Project STP-65-7(24)-20-35. The handicapped ramps were installed according to grade, but were rejected by the Iowa Department of Transportation which insisted that the ramps be replaced. When replacing the handicapped ramps Mr. W.C. Stokes, President of Pauline Company, Inc. requested that the Iowa Department of Transportation inspector inspect the grade before concrete for the ramps was placed upon such grade. The inspector refused to inspect the grade until required to do so by the District Department of Transportation Engineer.

6. The actions of the Iowa Department of Transportation have violated the constitutional rights of the Plaintiff as protected by the United States Constitution and the Constitution of the State of Iowa.

7. The actions of the Iowa Department of Transportation have violated Pauline Company, Inc.'s equal rights under the law as stated in 42 U.S.C. 1981 to make and enforce contracts and to be treated equally under the law.

7A. The actions of the Iowa Department of Transportation as set out above are the result of a policy or custom of the Iowa Department of Transportation to discriminate against the Plaintiff.

8. As a proximate result of the actions of the Defendant, Iowa Department of Transportation, the Plaintiff, Pauline Company, Inc., has been damaged in an undetermined amount.

9. The amount in controversy exceeds $5,000 and therefore jurisdiction lies in the Iowa District Court with direct appeal to the Iowa Supreme Court.

10. The Plaintiff requests a jury determine all issues triable to a jury in this matter.

WHEREFORE, it is hereby prayed that judgment be entered in favor of the Plaintiff and against the Defendant in an amount sufficient to adequately compensate the Plaintiff, for the attorney fees incurred by the Plaintiff in seeking relief from such constitutional violations and for costs of this action and for interest as allowed by law.

Count II

11. Plaintiff incorporates paragraphs 1-3 of Count I as if set forth in full herein.

12. Plaintiff acts as a subcontractor on highway projects wherein the Defendant, Iowa Department of Transportation, enters into contracts with prime contractors.

13. Defendant, Iowa Department of Transportation has contracted with prime contractors in writing with said written contracts manifesting an intent to benefit subcontractors, such as the Plaintiff.

14. The written contracts between the Iowa Department of Transportation and prime contractors express a contemplation by the Iowa Department of Transportation to convey benefit to subcontractors like the Plaintiff.

15. Plaintiff is an intended beneficiary of the contracts between the Iowa Department of Transportation and prime contractors.

16. Plaintiff is not in possession of the written contracts on the projects on which it has been discriminated against, but has knowledge that said contracts incorporate, either expressly or by implication the Iowa Department of Transportation specification book.

17. At Section 1105.07 of the Iowa Department of Transportation specification book it states: "The inspector will not act as supervisor or perform other duties for the Contractor nor improperly interfere with management of the work".

18. The Iowa Department of Transportation breached its contracts with prime contractors by allowing its inspectors to act in a discriminatory manner as set out in Count I, paragraph 5, thereby improperly interfering with the management of the work.

19. Plaintiff was damaged as a result of the Iowa Department of Transportation's breach of its contracts with prime contractors.

20. The amount in controversy in this matter meets the jurisdictional limit for the Iowa District Court and appeal, therefore, would be directly to the Iowa Supreme Court.

WHEREFORE, it is hereby prayed that the Court enter a judgment against the Defendant in an amount sufficient to compensate the Plaintiff for all damages suffered, for interest as allowed by law and for the costs of this action.

/s/ Peter J. Gartelos/TDA
Peter J. Gartelos
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/s/ Timothy D. Ament
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ATTORNEYS FOR THE PLAINTIFF
PAULINE COMPANY, INC.

IN THE IOWA DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY

RABBIT CORPORATION Plaintiff, vs. IOWA DEPARTMENT OF TRANSPORTATION, Defendant.	)	Law No. LACV083099 **SECOND AMENDED PETITION AND JURY DEMAND** (Filed Dec. 10, 1999)

COMES NOW the Plaintiff, and in support of its claim against the Defendant, Iowa Department of transportation, states:

COUNT I

1. The Plaintiff, Rabbit Corporation, is an Iowa minority owned corporation and a Certified Disadvantaged Business Enterprise (DBE) in good standing.

2. The Defendant, Iowa Department of Transportation, is a department of the government of the State of Iowa.

3. Rabbit Corporation is in the business of contracting which, in part, consists of contracting to provide services for road construction with the Iowa Department of Transportation.

4. Rabbit Corporation has been intentionally discriminated against by the Iowa Department of Transportation because of its status as a minority owned contractor.

5. Specific instances of intentional discrimination against Rabbit Corporation by the Iowa Department of Transportation include:

a. Rabbit Corporation was involved in several projects in 1998 which required fence building contracted by the Iowa Department of Transportation. However, Rabbit Corporation was required by the Iowa Department of Transportation to build fences differently than other non-minority contractors resulting in additional cost and expense to Rabbit Corporation. Rabbit Corporation was further required by the Iowa Department of Transportation to build a double pull post assembly whereas non-minority contractors were allowed to build a single pull post assembly.

b. In the course of fence building projects Rabbit Corporation was required to use mechanical connectors to splice brace wires whereas non-minority owned contractors were allowed to splice brace wires by wrapping it around itself.

6. The actions of the Iowa Department of Transportation have violated the constitutional rights of the Plaintiff as protected by the United States Constitution and the Constitution of the State of Iowa.

7. The actions of the Iowa Department of Transportation have violated Rabbit Corporation's equal rights under the law as stated in 42 U.S.C. 1981 to make and enforce contracts and to be treated equally under the law.

7A. The actions of the Iowa Department of Transportation as set out above are the result of a policy or custom of the Iowa Department of Transportation to discriminate against the Plaintiff.

8. As a proximate result of the actions of the Defendant, Iowa Department of Transportation, the Plaintiff, Rabbit Corporation, has been damaged in an undetermined amount.

9. The amount in controversy exceeds $5,000 and therefore jurisdiction lies in the Iowa District Court with direct appeal to the Iowa Supreme Court.

10. The Plaintiff requests a jury determine all issues triable to a jury in this matter.

WHEREFORE, it is hereby prayed that judgment be entered in favor of the Plaintiff and against the Defendant in an amount sufficient to adequately compensate the Plaintiff, for the attorney fees incurred by the Plaintiff in seeking relief from such constitutional violations and for costs of this action and for interest as allowed by law.

COUNT II

11. Plaintiff incorporates paragraphs 1-3 of Count I as if set forth in full herein.

12. Plaintiff acts as a subcontractor on highway projects wherein the Defendant, Iowa Department of Transportation, enters into contracts with prime contractors.

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said written contracts manifesting an intent to benefit subcontractors, such as the Plaintiff.

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16. Plaintiff is not in possession of the written contracts on the projects on which it has been discriminated against, but has knowledge that said contracts incorporate, either expressly or by implication the Iowa Department of Transportation specification book.

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19. Plaintiff was damaged as a result of the Iowa Department of Transportation's breach of its contracts with prime contractors.

20. The amount in controversy in this matter meets the jurisdictional limit for the Iowa District Court and

appeal, therefore, would be directly to the Iowa Supreme Court.

WHEREFORE, it is hereby prayed that the Court enter a judgment against the Defendant in an amount sufficient to compensate the Plaintiff for all damages suffered, for interest as allowed by law and for the costs of this action.

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ATTORNEYS FOR THE PLAINTIFF
RABBIT CORPORATION

IN THE IOWA DISTRICT COURT IN AND FOR BLACK HAWK COUNTY

PAULINE COMPANY, INC., Plaintiff,	:	Case No. LACV083098
v.	:	RULING ON
IOWA DEPARTMENT OF TRANSPORTATION,	:	MOTIONS TO DISMISS
Defendant.	:	
RABBIT CORPORATION, Plaintiff,	:	Case No. LACV083099
v.	:	(Filed Jan. 21, 2000)
IOWA DEPARTMENT OF TRANSPORTATION, Defendant.	:	

The above cases came before the court for hearing on December 13, 1999. The Plaintiffs were represented at the hearing by Attorney Timothy D. Ament, and the Defendant was represented at the hearing by Mark Hunacek, Assistant Attorney General assigned to the Iowa Department of Transportation. In reviewing the court file, the court notes the Motions to Dismiss filed on behalf of the Defendant, the Resistances to Motion to Dismiss filed by counsel for the Plaintiff, and the Defendant's Reply to Plaintiff's Resistance to Motion to Dismiss. And the court, having reviewed the court files, having heard arguments of counsel, and having reviewed a sampling of the cases cited by counsel, FINDS:

1. The sole issue to be determined by this court is whether the Civil Rights Act of 1991 amended 42 U.S.C. Section 1981, to allow a direct cause of action against a municipality overruling *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

2. That this is a case of first impression in the State of Iowa.

3. Not only is this a case of first impression here in Iowa, there is a split of authority between the federal circuit courts of appeal and the federal district courts on the issue. A number of district courts, relying chiefly on the language of Section 1981(c), have interpreted this new subsection to permit direct causes of action against state actors for violations of 42 U.S.C. Section 1981, and thus to overturn *Jett's* requirement that claimants sue state actors under 42 U.S.C. Section 1983 for violations of 42 U.S.C. Section 1981. Additional federal courts have held that the amended 42 U.S.C. Section 1981 does not overrule the decision in *Jett* and continue to require claimants to sue state actors under Section 1983 for violations of Section 1981. As stated in the decisions, the courts that agree with this line of thinking rely chiefly on the lack of explicit legislative history reflecting an intention to overrule *Jett*.

4. As the cases also reflect, commentators on the issue are also divided on this issue.

5. Relying upon the analysis contained in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996), this court finds that amended 42 U.S.C. Section 1981 contains an implied cause of action against state actors, thereby overturning *Jett's* holding

that 42 U.S.C. Section 1983 provides the exclusive federal remedy against state actors for the violation of rights under 42 U.S.C. Section 1981.

IT IS HEREBY ORDERED that the Defendant's Motions to Dismiss are **DENIED**.

The Clerk is to provide copies of this Order to counsel of record.

Dated January 20, 2000.

/s/ Bruce B. Zager
Bruce B. Zager, Judge
First Judicial District of Iowa

United States Code, Title 42

§ 1981. – Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law

Supreme Court U.S.
FILED
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(2)

No. 01-1394

In The

Supreme Court of the United States

PAULINE COMPANY, INC., and
RABBIT CORPORATION,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. MILLER
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131?

QUESTION PRESENTED

Should not this Court deny certiorari where: (1) the claimed conflict in the circuits arises from a decision of the Ninth Circuit Court of Appeals which represents a clear minority viewpoint, conflicts with the decisions in three federal appellate cases (in one of which, a petition for writ of certiorari has been denied) and has never been endorsed by any other federal appellate court; and (2) where the decision of the Iowa Supreme Court is clearly correct, in that it respects the clear language of the relevant statute and carefully analyzes legislative history?

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SUMMARY OF ARGUMENT

Although petitioners are eager to have a prior decision of this Court declared null and void, other courts have been more reluctant to do so. At least three federal appellate courts, eight federal district courts, and a state appellate court (besides the Iowa Supreme Court) have concluded that this Court's decision in *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) remains good law, notwithstanding the passage of the Civil Rights Act of 1991. This reasoning is sound, because there is nothing in the specific language of the Act which overturns the holding of *Jett*, and because legislative history reveals that the pertinent provision of the Act was designed to affirm the decision of this Court in another case, not overturn the decision in *Jett*. The decision of the Iowa Supreme Court not only reflects the clear majority view, but is also unquestionably correct.

STATEMENT OF THE CASE

The petitioners, Pauline Company, Inc. and Rabbit Corporation, are two minority-owned businesses who brought lawsuits against the Iowa Department of Transportation (DOT) alleging discrimination in numerous construction contracts. Both lawsuits were brought under 42 U.S.C. § 1981 and named only the DOT as defendant.

DOT moved to dismiss both lawsuits, asserting that section 1981 did not provide for a cause of action against state defendants. In their resistance, plaintiffs acknowledged that *Jett v. Dallas Independent School District*, 491

U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) was, if still good law, fatal to their claims, but asserted that it had been legislatively overruled by the Civil Rights Act of 1991.

Jett held that 42 U.S.C. § 1981 did not provide a private cause of action against state actors, since the exclusive remedy against state actors was under 42 U.S.C. § 1983. At the time *Jett* was decided, 42 U.S.C. § 1981 provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Interpreting this statute in *Jett*, this Court held that when Congress originally enacted sections 1981 and 1983, it thought that the declaration of rights in section 1981 would be enforced against state actors through the remedial provisions of section 1983. 491 U.S. at 731.

The Civil Rights Act of 1991 amended 42 U.S.C. § 1981 by adding two paragraphs, only the second of which is relevant here. That paragraph provides:

> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State Law.

Pub. L. 102-166, Title 1, § 101 (1991), 105 Stat. 1071. The question, therefore, is whether this new paragraph has the effect of overturning *Jett*.

The district court, in a cursory opinion that cited only the one federal appeals court decision supporting petitioners, and not displaying the reticence a lower state court might feel for declaring a decision of the United States Supreme Court to be null and void, concluded that *Jett* was no longer good law. By contrast, the Iowa Supreme Court, consistent with three federal appellate courts and numerous federal district courts, held that this legislative amendment did not overrule the *Jett* decision. Petition, App. at 1-5.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN *FEDERATION OF AFRICAN AMERICAN CONTRACTORS v. CITY OF OAKLAND*, RELIED ON BY PETITIONERS AS CREATING A CONFLICT IN THE CIRCUITS, REPRESENTS A DISTINCT MINORITY VIEW; THIS COURT HAS ALREADY DECLINED TO GRANT CERTIORARI ON AT LEAST ONE OTHER CASE CONFLICTING WITH THAT DECISION.

Petitioner argues that the decision of the Iowa Supreme Court conflicts with the decision of the Ninth Circuit Court of Appeals in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996). At the outset, it should be noted that there is no conflict between the results of these cases: in both cases the claim against the governmental entity was dismissed, albeit for

different reasons. Indeed, the only basis for Petitioners' claim that there is an apparent conflict between the Ninth Circuit's decision in *Oakland* and other courts is the discussion in *Oakland* about whether 42 U.S.C. § 1981 provides for a cause of action against state actors. At best, the portion of the Oakland decision discussing this issue represents a distinct minority view. The reasoning of the *Oakland* decision has been rejected in numerous other cases. Three different federal courts of appeals have specifically held that the *Jett* decision has not been overruled by the Civil Rights Act of 1991, and in one of these decisions a petition for writ of certiorari to this Court has been denied. *See Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458, 462-464 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 341, 151 L.Ed.2d 258 (2001); *Butts v. County of Volusia*, 222 F.3d 891, 892-94 (11th Cir. 2000); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995).

Moreover, a number of lower federal courts have also specifically concluded that the Civil Rights Act of 1991 did not overrule *Jett*. *See, e.g., Webster v. Fulton County*, 44 F. Supp. 2d 1359 (N.D. Ga. 1999); *Villanueva v. City of Fort Pierce*, 24 F.Supp.2d 1364 (S.D. Fla. 1998); *Tabor v. City of Chicago*, 10 F.Supp.2d 988 (N.D. Ill. 1998); *McPheal v. Board of Commissioners of Madison County*, 976 F.Supp. 1190 (S.D. Ind. 1997); *Reynolds v. Glynn County Board of Education*, 968 F.Supp. 696 (S.D. Ga. 1996); *Ebrahimi v. City of Huntsville Board of Education*, 905 F.Supp. 993 (N.D. Ala. 1995); *Johnson v. City of Fort Lauderdale*, 903 F.Supp. 1520 (S.D. Fla. 1995); *Philippeaux v. North Central Bronx Hospital*, 871 F.Supp. 640 (S.D. N.Y. 1994). At least one state appellate court other than the Iowa Supreme Court has, in a published opinion, also concluded that it was not the intent

of Congress to overrule *Jett*. *Brown v. State of New York*, 89 N.Y.2d 172, 185, 674 N.E.2d 1129, 652 N.Y.S. 2d 223, 231 (1996).

Thus, most courts that have addressed the issue presented by this case have concluded, consistent with the decision of the Iowa Supreme Court, that *Jett* was not overruled by the Civil Rights Act of 1991. As argued next, these decisions are unquestionably correct.

II. THE IOWA SUPREME COURT CORRECTLY DECIDED THIS ISSUE.

A number of factors lead to the conclusion that the decision of the Iowa Supreme court is correct. In particular:

1. *The Amendment to section 1981 is clear and unambiguous.*

There is nothing in the language of 42 U.S.C. § 1981(c) to suggest that Congress wanted to provide a private cause of action against state actors under section 1981. Because "the amendments to section 1981 are facially clear and unambiguous," it "is unnecessary to resort to legislative history" to conclude that it does not allow such a cause of action. *Johnson*, 903 F.Supp. at 1522 n.1. *See also Tabor*, 10 F.Supp.2d at 992 ("The language of section 1981(c) does not explicitly allow plaintiffs a direct cause of action against state actors. The fact that the amendment is facially clear and unambiguous should settle the question.").

2. *Nothing in the Act's legislative history supports petitioners' conclusion.*

Perhaps the most striking feature of the legislative history of the Civil Rights Act is the total absence of any reference to the *Jett* decision. This fact has certainly not been lost on the courts. *Tabor,* 10 F.Supp.2d at 992; *McPheal,* 976 F.Supp. at 1190; *Ebrahimi,* 905 F.Supp. at 995 n.2. As the Iowa Supreme Court noted, the House Committee on the Judiciary explained in its report that the Civil Rights Act of 1991 was enacted in response to a number of decisions of this Court. The report specifically listed ten decisions of this Court which were overruled by the Civil Rights Act of 1991. App. 4-5. *Jett* was not among the decisions listed. App. 5. It seems simply inconceivable that Congress could have intended to overrule the *Jett* decision, and yet not mention this fact when it had a clear opportunity to do so.

3. *The legislative history does establish the purpose of subsection (c).*

While the legislative history accompanying the Civil Rights Act of 1991 does not give any indication that it was the intent of Congress to overturn *Jett,* it does establish an alternative reason for the inclusion of subsection (c). In *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), this Court held that the rights protected under section 1981 are protected against private discrimination, as well as discrimination by state actors. The intent of subsection (c) is to codify this holding. Indeed, plaintiffs themselves, in their brief to the Iowa

Supreme Court, wrote: "The legislative history surrounding the 1991 Amendment to 42 U.S.C. 1981 does not explicitly announce an intent to create or deny a private right of action against a state actor. . . . Instead, it suggests that Congress' intent in adding this subsection was to codify *Runyon v. McCrary*. . . . The House Committee on the Judiciary explained in its report on the legislation that the Amendment to 1981 was intended to codify *Runyon v. McCrary*, noting further that '[t]he Committee intends to prohibit racial discrimination in all contracts, both public and private.' " Appellee's Brief to the Iowa Supreme Court, page 13.

4. *Petitioners apply an incorrect legal standard.*

Petitioners' argument is based on *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). However, the continued validity of this case is in doubt. *Thompson v. Thompson*, 484 U.S. 174, 188, 108 S.Ct. 513, 98 L.Ed.2d 511, 525 (1988) (Scalia, J., concurring). Even if *Cort* still applies, it is clear that Congressional intent "remains the ultimate issue." *Thompson*, 484 U.S. at 179, 98 L.Ed.2d at 520. Petitioners' discussion of Congressional intent completely ignores the fact that the *Jett* decision addressed that matter and concluded that Congress did *not* intend private and state actors to be treated the same with regard to remedies. Since 42 U.S.C. § 1981(c) does not address remedies at all, it is impossible to discern any intent to alter the holding of *Jett*.

CONCLUSION

It would be inappropriate to grant certiorari on the basis of a conflict created only by one opinion that has been repeatedly rejected by more recent decisions. The decision of the Iowa Supreme Court is correct and should not be disturbed.

Respectfully submitted,

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